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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1249

AMERICAN STEVEDORES, INC.,

Petitioner,

—against—

OLAF PEDERSEN'S REDERI A/S,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND APPENDIX

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No. .....

AMERICAN STEVEDORES, INC.,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, American Stevedores, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 9, 1975, affirming the issuance of summary judgment by the United States District Court for the Eastern District of New York granting the Respondent-Shipowner indemnity from the Petitioner-Stevedore in a longshoreman's negligence action contrary to a prior jury verdict.

Citations to Opinions Below

The decision granting a new trial by the late District Judge Rosling is not reported, but is printed in the Appendix hereto (28a).

The subsequent opinion of District Judge Neaher granting respondent summary judgment against Petitioner is reported at 387 F.Supp. 754, and is printed in the Appendix hereto (14a).

The United States Court of Appeals for the Second Circuit filed an opinion which as of this writing is not reported. It is, however, printed in the Appendix hereto (3a).

Jurisdiction

The judgment of the Court of Appeals was entered on December 9, 1975 (1a).

This petition for the issuance of a writ of certiorari is being filed within ninety (90) days after the entry of said judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The basis of jurisdiction in the Court of first instance was diversity of citizenship, 28 U.S.C. 1332.

Constitutional Provision Involved

United States Constitution, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Questions Presented

1. Was the Petitioner denied its constitutional right to trial by jury when the Court substituted its judgment for that of the jury on whether the Respondent's negligence constituted conduct sufficient to preclude indemnity? See *International Terminal Operating Co. Inc.* v. *N.V. Nederl A.S.M.*, 393 U.S. 74, 89 S.Ct. 53 (1968).

2. Is the maritime rule of imposing damages in proportion to fault violated when a vicariously liable stevedore is required to make full indemnity to a partly at fault shipowner? See *United States* v. *Reliable Transfer Co. Inc.*, 421 U.S. 397, 95 S.Ct. 1708 (1975).

3. Is a warranty of workmanlike service to be invoked from a shoreside contractor to the favor of a shipowner whose liability is based upon his own fault?

4. Does a longshoreman's contributory negligence constitute a breach, or merely some evidence of a breach, of his employer's warranty of workmanlike service?

5. Does the use of different standards to judge similar issues constitute an impermissible departure from the concept of a rule of law of equal application? See *Truax* v. *Corrigan*, 257 U.S. 312, 42 S.Ct. 124 (1921).

Statement of the Case

This lawsuit stems from an accident to a longshoreman named Joseph Rodriguez, who was injured while working aboard the M/V Sunny Prince on July 3, 1967. The petitioner, American Stevedores, Inc. (referred to as "Stevedore"), was the employer of Rodriguez; and respondent,

Olaf Pedersen's Rederi A/S (hereafter "Shipowner"), was the owner of the ship.

Rodriguez was injured in the afternoon of July 3, 1967 when he fell through an open hatch square in the darkened 'tween deck of the #2 hatch of the said vessel. The longshoremen, including Rodriguez, had worked in that hatch earlier in the day but had finished that work and moved on to other tasks in another hatch. Rodriguez's purpose in returning to the #2 hatch was to recover his gloves and hook that had been left there.

Unknown to Rodriguez or any of the other longshoremen, the conditions in the #2 hatch were changed drastically after they left. For, ship cleaners (working in the #2 hatch after the longshoremen had finished there) had removed the covers from the #2 'tween deck hatch square and, upon the express direction of the vessel's Chief Officer, did not replace those covers when their work was concluded. The cleaners, also at the direction of the vessel's Chief Officer, covered the corresponding opening in the weather deck, so that the #2 'tween deck hatch was now dark with an open hatch square. When the longshoremen had left that area it had been illuminated by the sun and the 'tween deck hatch square was fully covered with hatch boards.

There was an open passageway door leading from the #4 hatch where Rodriguez was working back to the now darkened and open #2 'tween deck square. Rodriguez went thru that door and passageway; and when he arrived on the 'tween deck of the now darkened #2 hatch, he tripped and fell through the uncovered opening into the lower hold.

Rodriguez sued the Shipowner for both negligence and unseaworthiness and claimed that by converting a covered and illuminated hatch square to one that was open and

darkened, without giving notice to the men working aboard the vessel, the Shipowner was negligent, and that the changed conditions were dangerous and rendered the vessel unseaworthy. The jury found against the Shipowner for both negligence and unseaworthiness. The Shipowner never appealed from that verdict and the judgment entered thereon. The jury found Rodriguez damaged to the extent of $80,000, but reduced his recovery to $35,000 because of his contributory negligence.

The same jury then heard summations and charge on the Shipowner's claim for indemnity against the Stevedore. In connection with that claim, the jury was charged that the finding of contributory negligence on the part of Rodriguez established a breach of the Stevedore's warranty of workmanlike service (hereafter WWLS) which entitled the Shipowner to indemnity unless its own conduct was sufficient to preclude recovery. In the light of that anticipated charge, the summations focused on the issue of "conduct precluding indemnity". The jury verdict in favor of the Stevedore obviously was a finding that the conduct forming the Shipowner's negligence was sufficient to preclude indemnity.

The Shipowner thereafter made a post-trial motion for a judgment of indemnity against the Stevedore notwithstanding the verdict upon the ground that the plaintiff's contributory negligence entitled it to such as a matter of law. Alternatively, it asked for a new trial. Believing that a *prima facie* case of indemnity precluding conduct had been established by the Shipowner's negligence, Judge Rosling denied the motion for judgment as a matter of law. However, he did grant the Shipowner a new trial on the indemnity issue so that it might have a further opportunity to put in additional proof on the question of the open door (31a).

Following Judge Rosling's demise, the case was reassigned to Judge Neaher. Nothwithstanding the fact that its motion for judgment against the Stevedore had already been denied by Judge Rosling, Shipowner moved again for that relief before Judge Neaher. And, even though Judge Rosling had granted the Shipowner a new trial so that it might have another opportunity to offer further evidence on the indemnity issue, Shipowner's attorney stated in his moving affidavit to Judge Neaher that he had no further proof to offer. Since Shipowner admitted that it had no additional evidence to present upon a new trial, the Stevedore then brought on a cross motion to recall the order for a new trial and for the entry of judgment in favor of the Stevedore in accordance with the jury verdict upon the ground that the Shipowner rendered academic Judge Rosling's *desideratum* for a new trial and waived its right to the same. In other words, if the Shipowner had no further proof to offer on the indemnity issues, there is no purpose served by a new trial and the verdict already rendered on the evidence presented should be enforced by a judgment.

Judge Neaher granted the Shipowner's motion for judgment against the Stevedore and denied the Stevedore's cross motion and judgment was entered accordingly

Thus, although a full jury trial on the merits resulted in a verdict in its favor, the Petitioner-Stevedore herein has been denied the fruits of that victory by inconsistent judicial intervention. The initial Trial Judge (Rosling, *D.J.*), consistently denied the Respondent-Shipowner's argument that it was entitled to indemnity as a matter of law, but awarded it a new trial so that it might have an opportunity to put in further proof. Respondent-Shipowner admitted it had no further proof to offer, but then obtained judgment against the Petitioner-Stevedore from Judge Neaher

on the identical arguments that had earlier been rejected by Judge Rosling.

That result was affirmed by the Court of Appeals in a decision which we submit is contrary to decisions of this Court, in conflict with decisions of other Circuit Courts, in conflict with its own prior decisions, and in fundamental disregard of petitioner's constitutional right to trial by jury and to be judged by standards no different than those used to judge others in similar positions.

The same unanimous jury that found the Shipowner negligent also found that its conduct precluded recovery of indemnity. It was an improper usurpation of the jury function for the Court to thereafter redetermine that issue and award judgment contrary to the jury verdict.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Act Herein Not Only to Halt Judicial Encroachment Upon the Constitutionally Guaranteed Right of Trial by Jury, But Also to Preserve the Integrity of Its Decisions.

The action of the judiciary herein in reversing the unanimous verdict of impartial jurors was not only contrary to the Seventh Amendment of the Constitution of the United States but was also in direct contravention of the controlling principles of law established by this Court in its guideline decisions in this field of law. There can be no doubt but that the issues of (1) whether a stevedore has breached its implied warranty of workmanlike service, and (2) whether a shipowner's conduct is such as to in any event preclude indemnity, *are issues of fact*. For this Court has so specifically declared in *Weyer-*

haeuser S.S. Co. v. *Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S.Ct. 438, 441. A jury verdict on such a fact issue is expressly protected by the Seventh Amendment to the Constitution of the United States, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law*" (Emphasis added).

The primary purpose of such amendment is the preservation of the "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under appropriate instructions of the Court", *Baltimore and C. Line* v. *Redman*, 295 U.S. 654, 657 (1935); *Walker* v. *New Mexico & S. P. R. Co.*, 165 U.S. 593, 596 (1897); and *Dimick* v. *Scheidt*, 293 U.S. 474, 476, 485-86 (1935).

A necessary corollary to the Seventh Amendment is that not even an appellate court may substitute its judgment for that of the jury, *Dennis* v. *Denver & Rio Grande Western Railroad Co.*, 375 U.S. 208. Where the evidence is susceptible of different conclusions by reasonable men, the issue must be resolved by the jury, *Scheimann* v. *Grace Line Inc.*, 267 F.2d 596. The function of an Appellate Court vis-a-vis a jury verdict has been well articulated by this Court in *Lavender* v. *Kurn*, 327 U.S. 645 and more recently in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110, wherein the following was quoted with approval from *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It was obviously for the jury to determine whether the Shipowner's conduct in keeping the hatch square uncovered while at the same time darkening the hatch, and in leaving the passageway door open as an invitation to use, all without notice or warning, was under the totality of circumstances conduct sufficient to preclude indemnity. It was not for a subsequent judge or the Court of Appeals to substitute their contrary judgment.

Indeed, in substituting its own contrary judgment, the Court of Appeals has tacitly refused to follow the directive of *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 358, 82 S.Ct. 780, 783 (1962), wherein this Court reversed the Court of Appeals and entered judgment in accordance with the jury's verdict, and stated:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law' ".

This Court further stated (p. 364 at 369 U.S. and p. 786 at 82 S.Ct.):

> ". . . Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. *For a search for one*

possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S. F. R. Co., 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889. Cf. Dick v. New York Life Ins. Co., 359 U.S. 437, 446, 79 S.Ct. 921, 927, 3 L.Ed.2d 935." (Italics added)

This proscription against judicial interference with and usurpation of the jury function was reiterated in *International Terminal Operating Co. Inc.* v. *N.V. Nederl A.S.M.*, 393 U.S. 74, 89 S.Ct. 53 (1968) where this Court *summarily* reversed the Court of Appeals for the Second Circuit and reinstated a jury verdict in favor of the stevedore against the shipowner, and said with regard to a claim for maritime indemnity:

"Under the Seventh Amendment that issue should have been left to the jury's determination".

The power of the federal judiciary is awesome, but is constitutionally limited. Tempting as it may be for judges to want to decide fact issues, such a temptation constitutes an abuse of power where the issue has already been resolved by a jury. Unless this Court acts, this Petitioner is without means to obtain enforcement of its constitutional right to trial by jury, and is without means to compel the lower federal judges to comply with the express directives of this Court. Others similarly situated in both this and other fields need such intervention by this Court to halt encroachment upon and erosion of the right to trial by jury.

II.

This Court Should Act Herein in Order to Restore the Rule of Law by Resolving Many Inter and Intra Circuit Conflicts on the Various Issues Present in This Case.

In the field of maritime personal injury there is such fundamental conflict between various Circuits and between different panels in the same Circuit that the concept of a "rule of law" seems to have vanished. Similarly situated parties receive altogether different justice merely because different jurists are applying different standards. The results are unfair, unpredictible and in violation of each person's fundamental right to equal application of the law. Consider the following:

A. *Where a Shipowner Is Liable for Its Own Fault, Is It Entitled to Receive an Implied Warranty of Workmanlike Service?*

Virtually every court that has considered the issue has held that the implied warranty of workmanlike service (WWLS) is judicially invoked as an equitable measure only to compensate an innocent shipowner who is liable for unseaworthiness (a species of liability without fault) occasioned or brought into play by some improper act of a stevedore or other shoreside contractor. Thus, in the Ninth, Fifth and Sixth Circuits, a WWLS is not invoked to benefit a shipowner whose liability, as here, is based upon its own fault. See *Davis* v. *Chas. Kurz & Co. Inc.*, 483 F.2d 184, 187 (9 Cir. 1973); *Centraal Stikstof Verkoopkanter M.V.* v. *Walsh Stevedoring Co.*, 380 F.2d 523, 529 (5 Cir. 1967); *Loffland Bros. Company* v. *Roberts*, 386 F.2d 540, 548-549 (5 Cir. 1967); *Hobart* v. *Sohio Petroleum Company*, 445 F.2d 435 (5 Cir. 1971); *Sandoval* v. *Mitsui*, 460

F.2d 1163, 1168 (5 Cir. 1972); *Whisenant* v. *Brewster & Bartle Offshore Company,* 446 F.2d 394, 403 ft. 31 (5 Cir. 1971); and *Liberty Mutual Insurance Company* v. *Fruehauf Corporation,* 472 F.2d 69, 71 (6 Cir. 1972). As these cases indicate, the WWLS was intended to "mitigate the harshness of the seaworthiness doctrine where the stevedoring firm was to blame for the injury to its employee". It was never intended to benefit a shipowner liable, as the respondent was here, for its own negligence or fault.

Although some of the panels of the Second Circuit have agreed that the WWLS is to be invoked only to benefit an otherwise innocent shipowner liable solely for the warranty of seaworthiness, other panels in the Second Circuit have disagreed and have invoked the WWLS regardless of whether the shipowner has been innocent or at fault. Compare *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270, 276 (2 Cir. 1968) and *Fairmont Shipping Corp.* v. *Chevron International Oil Company, Inc.,* 511 F.2d 1252, 1258 (2 Cir. 1975) with *Henry* v. *A/S Ocean,* 512 F.2d 401 (2 Cir. 1975).

This conflict is critical to the case at bar since we are not dealing here with an innocent shipowner, but rather one that was found to be negligent and at fault. The Courts in the Fifth, Sixth and Ninth Circuits would not have invoked any implied warranty of workmanlike service from the Petitioner and the indemnity claim would have been dismissed without any question being reached as to whether the WWLS was breached and whether the Shipowner's conduct precluded indemnity. However, the Court below invoked such warranty, notwithstanding the fact that the Shipowner was negligent, and found that it was breached by plaintiff's contributory negligence and that the jury verdict of Shipowner's indemnity precluding conduct could be legally ignored.

There is no reason why the rights and obligations of shipowners and shoreside contractors *inter se* should vary so drastically depending upon the jurisdiction in which the litigation is commenced or the makeup of a particular panel.

B. *Does Contributory Negligence of an Employee Constitute a Breach of the Warranty of Workmanlike Service as a Matter of Law, or Is It Merely Some Evidence of the Same?*

The opinion of the Court below expressly recognizes that there is a conflict between the circuits on this issue (6a). The First, Second, Fourth and Ninth Circuits hold that the WWLS is breached as a matter of law by a finding of contributory negligence; and the Third and Fifth Circuits hold that such a finding is merely some evidence of a breach of WWLS. Thus, in the Fifth Circuit decision in *Julian* v. *Mitsui,* 479 F.2d 432, cert. den. 414 U.S. 1093, indemnity was denied notwithstanding that a finding of 95% contributory negligence; whereas in the Second Circuit in *Hartnett* v. *Reiss S.S. Co.,* 421 F.2d 101, cert. den. 400 U.S. 852, indemnity was mandated by reason of 1% contributory negligence.

But even the Second Circuit rule is not uniform in its application for only recently, in *Nye* v. *A/S D/S Svendborg,* 501 F.2d 376 (1974), cert. den. 420 U.S. 964, a finding of 50% contributory negligence was held not to constitute a breach of the WWLS and the shipowner's claim for indemnity was dismissed. Why should such difference in treatment exist within the same circuit?

It is to be further noted that the New York Court of Appeals seems to have lined up with the Third and Fifth Circuits in *Anzalone* v. *Moore-McCormack Line, Inc.,* 36 N.Y.2d 684 (1975) by affirming a decision of the Appellate Division, First Department, 43 A.D.2d 818, which in turn

affirmed a trial court's judgment dismissing a shipowner's indemnity claim for breach of WWLS based upon a plaintiff-employee's contributory negligence.

Manifestly this conflict in law is also of importance in the instant case since the Court below held that as a matter of law Rodriguez's contributory negligence constituted a breach of the WWLS, and it was that initial holding that then made the question of preclusive conduct so important. Again, why should resolution of this issue depend upon the jurisdiction in which the action is brought or the makeup of the panel that hears the case. We are dealing with matters of federal maritime law which should be uniform and of equal application throughout the country. In view of the existing conflict, we submit it is the duty of this Court to speak out and resolve the conflicts and promote such a uniform rule of law.

C. *By What Yardstick Is a Shipowner's Conduct to Be Measured to See If It Precludes Indemnity.*

The jury that found the Shipowner negligent (which finding was never appealed) also found that such conduct precluded indemnity. That conduct consisted of transforming a covered and illuminated 'tween deck hatch square into an open and darkened trap without notice or warning to those likely to use the same, and to permit the use of a passageway to such trap. Yet, by some extraordinary use of judicial power, the Court below held that as a matter of law such negligent conduct of the Shipowner did not warrant jury consideration.

Consider how Judge Augustus Hand viewed almost identical conduct by a shipowner in *Badalamenti* v. *United States,* 160 F.2d 422, 425 (2d Cir. 1947):

"After he had proceeded 15 or 20 feet, and beyond a point where the light coming from open hatch No. 2 had penetrated, he was of course aware that he was in an area of darkness; nevertheless, *he had no reason to suppose that hatch No. 1 was open and that he ran any risk, other than the general one of stumbling against something in the dark,* for hatch No. 1 was closed on the deck above. We cannot say that he was likely to encounter any danger in attempting slowly to traverse this passage if, as he supposed, the hatch was not open. *Had it not been open he would not have plunged into the open hatch and met the fate which caused his injuries. Under the circumstances the trial judge was right in holding that Badalamenti's fall and injuries arose solely from the negligence of the respondent in not warning the stevedores that there was an open hatch within about 50 feet of where they were to work. We think it was foreseeable that they might have occasion to go to parts of the deck that were not lighted in pursuit of their calling. If they did, the open hatch was a great danger for it was not protected by any guardrail or ropes, or by any coaming sufficient to prevent an accident.* It is not reasonable to suppose that stevedores would not be likely to go about the deck where they were working and not to foresee danger to them from an open hatch which was only about 50 feet away. As a distinguished court said in Pioneer S.S. Co. v. McCann, 6 Cir., 170 F. 873, 868: *'It is hardly to be expected that men entering or working within a ship's hold will always keep within the exact parts of the hold where their employment, strictly construed, would call them.'*

"The opinion of Judge Woods in The Omsk, 4 Cir., 266 F. 200, supports the view that some warning or protection against an open hatch was required in cir-

cumstances like those here, where the open hatch was in the control of the shipowner. See also West India & P.S.S. Co. v. Weibel, 5 Cir., 113 F. 169." (italics added)

Although the Second Circuit held in *Badalamenti, supra,* that neither of the two plaintiffs there were guilty of contributory negligence in walking about the darkened hatch since the only risk they ran was of stumbling against something in the dark and not falling through an open hatch, the Shipowner in the instant case has received more beneficial treatment by the reduction of the judgment against it for the contributory negligence of Rodriguez who in no respect acted differently then either of the plaintiffs in *Badalamenti.* And it is now given indemnity for its own fault contrary to a jury verdict.

How can it be said that in creating this foreseeably dangerous situation and without giving any warning or notice of the same to the longshoremen and, indeed, in leaving open and ajar a passageway door so as to implicitly invite its use as access to the #2 hatch, this Shipowner's conduct did not constitute a prima facie case for preclusion of indemnity? Indeed, in other recent instances different panels of the Second Circuit found even less egregious conduct by a Shipowner sufficient to preclude indemnity.

In *Conceicao* v. *New Jersey Export Marine Carpenters Inc.,* 508 F. 2d 437 (3 Cir. 1974), the shipowners failure to give the longshoreman proper information about the quantity of the stow and the place of stowage was held sufficient to preclude indemnity, notwithstanding the stevedore's breach of WWLS in overloading and breaking a pipe crib.

In *Hurdich* v. *Eastmount Shipping Corp.,* 503 F. 2d 397 (2 Cir. 1974), the Second Circuit again considered indemnity precluding conduct. It held that the shipowners actual knowledge of the conditions and its failure to rectify the same was sufficient to constitute preclusive conduct. How then does the case at bar vary, and why should this petitioner be deprived of the jury verdict in its favor?

Conduct precluding indemnity in other Circuits has been held to include allowing a 'tween deck reefer door to swing into the hatchway where it was pulled off its hinges, *Blow* v. *Compagnie Maritime Belge,* 395 F. 2d 74 (4 Cir. 1968); the furnishing of defective hatch beams, *Waterman Steamship Corporation* v. *David,* 353 F. 2d 660 (5 Cir. 1965); the furnishing of defective ladder support brackets, *Delaneuville* v. *Simonsen,* 437 F. 2d 597, 602 (5 Cir. 1971); furnishing defective ladders, *Maples Case,* 1966 A.M.C. 2032, *aff'd sub. nom. D/S A/S Sverre* v. *Textports Stevedore Co. Inc.,* 387 F. 2d 648 (5 Cir. 1968); and furnishing defective hot water heaters, *Garner* v. *Cities Service Tankers Corporation,* 456 F. 2d 476 (5 Cir. 1972). Certainly it cannot be said as a matter of law that the conduct of the shipowners in those cases was any more egregious than the conduct of the Shipowner in the case at bar. There is no doubt but that in other circuits, and before other panels in the Second Circuit, the conduct of the Shipowner in the case at bar would have been considered sufficient to raise a fact question for resolution by the jury on the issue of conduct precluding indemnity. This type of juridical conflict which borders on the metaphysical should not be permitted to deprive a litigant of a favorable jury determination of a fact issue.

D. *What Standard Is to Be Utilized in Determining Where the Ultimate Liability for Shipboard Accidents Should Be Placed?*

In *DeGioia* v. *United States Lines Company,* 304 F. 2d 421, 426 (2 Cir. 1962), a well reasoned decision by Judge Clark held that the function of the doctrine of indemnification was to allocate the loss for a shipboard accident on the "institution or institutions most able to minimize the particular risk involved." The concept that liability "should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury" was thereafter adopted by this Court in *Italia Societa* v. *Oregon Stevedoring Company,* 376 U.S. 315, 324, 84 S. Ct. 748, 754 (1964).

Indeed, the Second Circuit itself has utilized that same standard in evaluating indemnity precluding conduct in recent decisions such as *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.,* 508 F. 2d 437 (2 Cir. 1974), cert. den. 421 U.S. 949 (1975), and *Hurdich* v. *Eastmount Shipping Corp.,* 503 F. 2d 397 (2 Cir. 1974). That same concept was again utilized by the Second Circuit in *Nye* v. *A/S D/S Svendborg,* 501 F. 2d 376 (2 Cir. 1974) in exonerating the plaintiff's employer from indemnity nothwithstanding that the plaintiff was 50% contributorily negligent.

It is obvious that the use of such a standard in considering the indemnity precluding conduct of the Shipowner in the case at Bar would support the jury verdict since the conditions that caused the accident were caused by and under the control of the Shipowner and could only have been rectified by the Shipowner.

However, rather than utilize the standard which it itself had created and which had been expressly approved by this Court and thereafter used by the Second Circuit in other

cases, the Court below shifted to a "prevent or hinder" test for which it found support in other conflicting decisions in the Second Circuit. It then held *as a matter of law* that the darkened hatch was not a hindrance to Rodriguez in his efforts to locate his hook and glove!

This obvious straining against a jury verdict by the utilization of a different legal standard is a subtle way of circumventing the right to trial by jury and it destroys the concept of a rule of law of equal application, see *Truax* v. *Corrigan,* 257 U.S. 312, 42 S. Ct. 124 (1921).

Of course, it should be obvious that even if the "prevent or hinder" test be the proper one, then it certainly cannot be said as a matter of law that Mr. Rodriguez' efforts to locate his hook and glove were not hindered or impeded by the darkening of a previously illuminated hatch and by the opening of a hatch square which had previously been closed. Even under that standard, the verdict is supportable.

III.

This Court Should Decide Whether Its Recent Decision in *United States* v. *Reliable Transfer Co. Inc.,* 421 U.S. 397, 95 S. Ct. 1708 (1975) Does Not Require Reconsideration of the Principle of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 72 S. Ct. 277 (1952).

In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 72 S. Ct. 277 (1952), this Court held that a Shipowner could not obtain *contribution* from the compensation paying employer of a person injured aboard ship. The purpose was to immunize such employer from any further monetary exposure beyond the payment of compensation.

However, four years later, the effect of denying any contribution to an innocent Shipowner vicariously liable under its warranty of seaworthiness for some fault of the employer led this Court to invoke an equitable implied warranty of workmanlike service from the employer, *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 76 S. Ct. 232 (1956). The *Ryan* doctrine required full indemnity, rather than contribution. Obviously, the need for an equitable doctrine like *Ryan* would never have existed had the Court not earlier barred contribution in *Halcyon*. The end result is that the initial effort to limit the stevedore's exposure to compensation payments by immunizing it from contribution resulted in imposing an even greater burden upon the stevedore for indemnity under the *Ryan* doctrine.

Recently, in *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708 (1975) and in *Cooper Stevedoring Co. Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974), this Court recognized the equitable considerations requiring a change in the maritime law so that damages be imposed in direct proportion to fault. It would appear that the "all or nothing" approach inherent in *Halcyon* and *Ryan* is outmoded and should be replaced by the proportional fault rule articulated in *United States* v. *Reliable Transfer Co. Inc., supra*. Utilization of such a rule would suggest exoneration of the Petitioner since the Respondent's liability has already been reduced by the amount of Rodriguez' contributory negligence. In any event, for the Second Circuit to hold as a matter of law that a partly at fault Shipowner need pay no damages whatever is in direct violation of the proportional fault rule of *Reliable Transfer, supra*.

IV.

The Issues Presented Here Are Significant, Important and Warrant Clarification.

Manifestly, the issue relating to judicial deprivation of the constitutionally guaranteed right to trial by jury, and the issue relating to a departure from the concept of a rule of law of uniform application, are issues of broad general importance to all present and prospective litigants. Judicial efforts to encroach upon the right to trial by jury must be resisted. And, it is obvious that equal justice is not to be had unless the same standards are applied to all persons similarly situated.

Some of the other issues relating to the relationship between a Shipowner and a Stevedore in a personal injury action brought by a longshoreman may have been somewhat limited, as the Court of Appeals indicates, by reason of 33 U.S.C. §905(b). However, by projection from cases pending in your deponent's office, it is estimated that there are still several thousand cases pending in this country which antedate the November 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §905(b) and which involve the issues here presented.

Furthermore, there are a growing number of cases where the issues vis-a-vis a Shipowner and a shoreside contractor are unaffected by the *Longshoremen's and Harbor Worker's Compensation Act* because the person injured aboard the vessel may not be an employee of that shoreside contractor.

We believe that the issues here presented are important to the disposition of thousands of pending cases in the maritime field, and will continue to be of importance in

that field. And, of course, in a society proud of its heritage of the "rule of law", the right to jury trial and equal application of the law is always a fundamental concern.

CONCLUSION

By reason of the foregoing it is respectfully submitted that the petition herein should be granted and a Writ of Certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of December one thousand nine hundred and seventy-five.

Present:

HON. LEONARD P. MOORE
HON. WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

75-7170

JOSEPH RODRIGUEZ,

Plaintiff-Appellee,

v.

OLAF PEDERSEN'S REDERI A/S,

Defendant-Third Party Plaintiff-Appellee,

v.

AMERICAN STEVEDORES, INC., and A.M. KRISTOPHER CO., INC.,

Third Party Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

By /s/ Vincent A. Carlin
Chief Deputy Clerk

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 78—September Term, 1975.

(Argued October 23, 1975 Decided December 9, 1975.)

Docket No. 75-7170

Joseph Rodriguez,

Plaintiff,

—against—

Olaf Pedersen's Rederi A/S,

Defendant and Third Party Plaintiff-Appellee,

—against—

American Stevedores, Inc.,

Third Party Defendant-Appellant,

—and—

A. M. Kristopher Co., Inc.,

Third Party Defendant.

Before:

Moore, Feinberg and Van Graafeiland,
Circuit Judges.

Appeal from summary judgment for shipowner on third-party action for indemnity from stevedore in longshoreman's negligence action, entered in United States District Court for the Eastern District of New York, Edward R. Neaher, *J.*

Affirmed.

JOSEPH ARTHUR COHEN, New York, N.Y. (Alexander, Ash, Schwartz & Cohen; Sidney A. Schwartz, on the brief), *for Third Party Defendant-Appellant.*

THOMAS F. MOLANPHY, New York, N.Y. (Haight, Gardner, Poor & Havens; William P. Kain, Jr., on the brief), *for Defendant and Third Party Plaintiff-Appellee.*

FEINBERG, *Circuit Judge:*

In this case we again have the three-cornered lawsuit involving an injured longshoreman, the shipowner and the stevedore. The complexity of the issues before us is lessened somewhat because on appeal only the stevedore and the shipowner remain in the litigation, the stevedore appealing from the grant of summary judgment for the shipowner on the latter's third-party complaint, by the United States District Court for the Eastern District of New York, Edward R. Neaher, *J.* We affirm.

I

Since the facts of the case are set out in detail in Judge Neaher's thorough opinion, 387 F. Supp. 754, we will discuss them only briefly. Joseph Rodriguez, a longshoreman employed by appellant American Stevedores, Inc. (Stevedore) was injured in July 1967 when he fell through an

open hatch square in the upper tween deck of hatch #2 of a vessel owner by appellee Olaf Pedersen's Rederi A/S (Shipowner). Earlier in the day, Rodriguez had worked in that hatch, but the longshoremen had completed their work there and moved on to other tasks in another hatch. Telling his supervisor that he had left his hook and gloves in the #2 hatch, Rodriguez made his way back along a darkened corridor, with only a small penlight for illumination, ignoring a less direct but safer route. In the meantime, at the order of the vessel's chief officer, ship cleaners had removed the covers from the #2 hatch tween deck, which had been covered when the longshoremen were working; the cleaners had also covered the corresponding opening in the weather deck, so that the #2 hatch was now dark. When Rodriguez arrived on the tween deck of the darkened #2 hatch, he tripped and fell through the uncovered opening into the lower hold.

At the resulting trial in 1971, a jury found the Shipowner negligent, but reduced Rodriguez's damages from $80,000 to $35,000 because of his contributory negligence. The same jury denied the Shipowner's claim that it was entitled to indemnity from the Stevedore because the latter had breached its warranty of workmanlike performance, but the judge, the late George Rosling, set aside the verdict and ordered a new trial.[1] Before the new trial could begin, however, Judge Rosling died, and the case was assigned to Judge Neaher. Neither party had additional evidence to submit, and the Shipowner, contending that on the record of the prior trial it was entitled to indemnity as a matter of law, moved for summary judgment, which was granted. This appeal by the Stevedore followed.

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1 The Stevedore argues that this was error. We need not discuss the propriety of this ruling, however; since we conclude that the Shipowner at that time was entitled to the judgment it then sought as a matter of law, any error in granting a new trial was in the Stevedore's favor.

II

The Stevedore raises two principal issues. First, it argues that the Shipowner is not entitled to indemnity because the Stevedore did not, as a matter of law, breach its warranty. As Judge Neaher correctly pointed out, a long line of cases in this circuit holds that as a matter of law, a stevedore's warranty is breached when it supplies a negligent employee, and that therefore a jury finding of contributory negligence on the part of a longshoreman-plaintiff requires that verdict be directed against his stevedore employer on this issue. *King* v. *Deutsche Dampfs-Ges,* Dkt. Nos. 75-7127, 75-7151, slip op. 5479, 5484-85 (2d Cir. Aug. 8, 1975); *Hartnett* v. *Reiss S.S. Co.,* 421 F.2d 1011, 1017-18 (2d Cir.), cert. denied sub nom. *Grain Handling Co.* v. *Hartnett,* 400 U.S. 852 (1970); *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F.2d 1334 (2d Cir.), cert. denied, sub nom. *Golten Marine Co.* v. *Trelleborgs Angfartygs A/B,* 395 U.S. 946 (1969); *Mortensen* v. *A/S Glittre,* 348 F.2d 383 (2d Cir. 1965).[2] The Stevedore's reliance on *Nye* v. *A/S D/S Svendborg,* 501 F.2d 376 (2d Cir. 1974), cert. denied sub nom. *The Svendborg* v. *Marine Engine Specialties Corp.,* 420 U.S. 964 (1975), is misplaced, for that case explicitly distinguished cases involving the warranty. 501 F.2d at 380. Once the jury determined that Rodriguez, the Stevedore's employee, was contributorily negligent, no further issue of fact was presented; as a matter of law, the Stevedore breached its warranty.

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2 Accord, *Santiago Martinez* v. *Compagnie Generale Transatlantique,* 517 F.2d 371 (1st Cir. 1975), petition for cert. pending, 44 U.S.L.W. 3243 (Oct. 21, 1975); *United States Lines, Inc.* v. *Jarka Corp. of Baltimore,* 444 F.2d 26 (4th Cir. 1971); *Arista Cia. DeVapores, S.A.* v. *Howard Terminal,* 372 F.2d 152 (9th Cir. 1967). Contra, *Julian* v. *Mitsui O.S.K. Lines, Ltd.,* 479 F.2d 432 (5th Cir.), cert. denied sub nom. *Mitsui O.S.K. Lines, Ltd.* v. *Strachan Shipping Co.,* 414 U.S. 1093 (1973); *Shaw* v. *Lauritzen,* 428 F.2d 247 (3d Cir. 1970).

III

The Stevedore's second argument is that even if it did breach its warranty, there remains an issue of fact as to whether there was "conduct on [the Shipowner's] part sufficient to preclude recovery." *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.,* 355 U.S. 563, 567 (1958). Although the Supreme Court in *Weyerhaeuser* did not make clear what sort of conduct would be "sufficient to preclude recovery," we have held that in order to justify that result, the shipowner's fault

> must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough.

Albanese v. *N.V. Nederl. Amerik Stoomv. Maats.,* 346 F.2d 481, 484 (2d Cir.), rev'd on other grounds, 382 U.S. 283 (1965). See also *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats.,* 392 F.2d 763, 765 (2d Cir.), rev'd on other grounds sub nom. *International Terminal Operating Co.* v. *N.V. Nederl. Amerik Stoomv. Maats.,* 393 U.S. 74 (1968); *Hartnett* v. *Reiss S.S. Co.,* supra, 421 F.2d at 1017; *Mortensen* v. *A/S Glittre,* supra, 348 F.2d at 385. If this is to be the standard, a directed verdict for the Shipowner was in order here despite the Stevedore's claim that a jury question was presented. The Shipowner's fault was the creation of a potentially hazardous condition by uncovering the hatch square on the tween deck in hatch #2 and blocking off the light coming from above. Nothing about this negligence on the Shipowner's part prevented or hindered Rodriguez from rendering a workmanlike performance, that is, from using the safe route between hatches that was available, or at least securing adequate illumination before venturing down a dark corridor into a dark hatch.

The Stevedore argues, however, that a jury question was presented under our recent decisions in *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.*, 508 F.2d 437 (2d Cir. 1974), cert. denied, sub nom. *Cia de Nav. Mar. Netumar* v. *Conceicao,* 421 U.S. 949 (1975), and *Hurdich* v. *Eastmount Shipping Corp.*, 503 F.2d 397 (2d Cir. 1974). In *Conceicao,* plaintiff longshoreman was injured by a rolling steel pipe when wooden pipe cribs broke because they were stowed with too many pipes by the stevedore employer. The plaintiff was not contributorily negligent. Although the jury found that the stevedore had breached its warranty, the jury also found that the shipowner's conduct precluded recovery, and we affirmed. The conduct held sufficient to preclude the shipowner's indemnity consisted essentially of its failure to give the stevedore proper information regarding the overall amount of pipes to be stowed and the location of available pipe beds and the shipowner's lack of supervision of the loading. This was a direct hindrance of a stevedore attempting to do in a workmanlike manner the very job for which he was engaged. The conduct of the Shipowner's personnel here, while negligent, was far more remote from the Stevedore's actual work and did not hinder or prevent Rodriguez from performing his job satisfactorily.

Similarly, our recent decision in *Hurdich* does not compel the conclusion that Judge Neaher improperly applied the "prevent or hinder" test. In that case, as will be seen below, the court did not purport to apply the "prevent or hinder" standard at all and did not refer to our decisions in *Albanese, Mortensen* or *Hartnett.* In addition, as we also explain below, *Hurdich* on its facts is distinguishable from the present case.

The Stevedore also argues, however, that "prevent or hinder" should not be the standard, relying on *Conceicao* and *Hurdich.* According to the Stevedore, these decisions

indicate that we have abandoned the "prevent or hinder" rule in favor of a different test for indemnity-precluding conduct, and under the new test the judgment against it was improper.

While both *Hurdich* and *Conceicao* evidence this court's concern about the apparently harsh impact on stevedores of the rules in this area, neither case compels the conclusion that we have adopted a new definition of conduct sufficient to preclude indemnity, at least in cases like the one at bar. The jury verdict for the stevedore that we affirmed in *Conceicao* was rendered after instructions that indemnity for the shipowner was precluded if it "by some action or inaction . . . prevented, hindered, or seriously handicapped [the stevedore] in performing its workmanlike job." 508 F.2d at 443. Although the court felt, in words borrowed from the Supreme Court's decision in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), that the shipowner was "the party . . . most able to minimize the particular risk involved," id., this language does not appear to have been intended as the adoption of a new rule.

In *Hurdich,* there is some indication of an intention to break new ground, since the opinion, quoting from *Italia Societa,* supra, says that the test that "should have been applied by the district court below but was not . . . is that 'liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury.'" 503 F.2d at 401. As already indicated, however, we do not believe that *Hurdich* is inconsistent with the result we reach here. In that case, the shipowner had engaged a contractor (stevedore) to replace an antenna insulator. The work was done on two separate days. On the first day, the old insulator was removed by an employee of the stevedore and two of the ship's crew. This process created debris, which the three workers

cleaned up. The stevedore's employee returned alone three days later to complete the work, creating no additional debris and performing no further clean-up. Two weeks later, the plaintiff, an employee of the shipowner, fell on some of the insulation debris that was supposed to have been cleaned up. The plaintiff was not contributorily negligent. This court ruled that the shipowner's conduct precluded indemnity from the stevedore.

The case is fairly distinguishable. The plaintiff in *Hurdich* was a member of the ship's crew, rather than, as in this case, a contributorily negligent employee of the stevedore, and the stevedore's breach of warranty was remote from the accident to which it contributed. In fact, the accident occurred two weeks after the stevedore's unworkmanlike performance. During all of this period, the shipowner's employees had exclusive control over the area and the ship "alone was capable" of correcting the dangerous condition, which it negligently failed to do. 503 F.2d at 402. In such a case, the shipowner did not "prevent or hinder" workmanlike performance by the contractor, but neither was its fault "merely concurrent." Rather, it was an intervening cause. See *La Capria* v. *Compagnie Maritime Belge*, 427 F.2d 244, 247 (2d Cir. 1970). When the stevedore's breach of warranty consists of the contributory negligence of its own employee, the plaintiff, such an analysis is usually not fruitful. Here, for example, Rodriguez's unworkmanlike performance was the immediate, and, by the jury's estimate holding him over 50 per cent contributorily negligent, the more important cause of the accident.

While the panel in *Hurdich* did disapprove of the test used by the district judge there, which was the "prevent or hinder" test,[3] the opinion does not explicitly disavow

3 See *Hurdich* v. *R.C.A. Corp.*, 359 F. Supp. 1222, 1224 (S.D.N.Y. 1973).

the earlier line of cases already discussed. Nor was there occasion to. In *Hurdich*, where the shipowner's negligent conduct occurred well *subsequent* to the stevedore's breach of warranty, the "prevent or hinder" test, which was formulated in cases where the shipowner's conduct occurred *prior to* or *contemporaneous with* the breach, was ill-adapted for reaching an equitable result. Judge Neaher correctly assumed that the "prevent or hinder" standard was consistent with our decision in *Hurdich*, and that both are consistent with the policy announced by the Supreme Court in *Italia Societa* of placing responsibility on the party best able to minimize the risk involved. Under the circumstances of this case, we believe that we must still apply the "prevent or hinder" standard, as Judge Neaher did.[4]

IV

The Stevedore argues that the interplay of the rules discussed above leads to a result which is anomalous and unfair, in that the Shipowner, which negligently created a dangerous condition and failed to warn business invitees, is indemnified from the consequences of its negligence by the Stevedore, which was not otherwise at fault, only because the Stevedore's employee was contributorily negligent in falling into the trap the Shipowner had created. Thus, the plaintiff's contributory negligence not only reduces the amount of the judgment against the Shipowner

4 Our conclusion that the Shipowner's conduct did not preclude indemnity as a matter of law disposes of the Stevedore's contention that it was deprived of its right to have a jury determination of the issue. Although the Stevedore is correct that this is ordinarily an issue of fact, *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567 (1958); *Hurdich* v. *Eastmount Shipping Corp.*, 503 F.2d 397, 401 n.3 (2d Cir. 1974), the court of course remains free to direct a verdict where the evidence is insufficient to raise a jury question, and we have approved the trial judge's decision to do so in appropriate cases. See, e.g., *Mortensen* v. *A/S Glittre*, 348 F.2d 383 (2d Cir. 1965).

but also entitles it to shift the remainder of the damages, as well as the legal expenses it incurred in defending the action, to the otherwise innocent Stevedore. The Shipowner responds that the equities do not support the Stevedore at all. Thus, the Shipowner stresses that whatever it "should or should not have done, a workmanlike performance [by Rodriguez] would have eliminated the risk of injury."[5] Moreover, as Judge Neaher noted:

> Rodriguez did not enter hatch #2 in order to perform any assigned task. [The Shipowner] had no reason to expect longshoremen to be in that hold, since the stevedore's work there had been completed. And if the *Italia* test is to be applied, Rodriguez and his gang boss were best situated to avoid the danger by inspection of the area with an adequate light.

387 F. Supp. at 760.

We have long been troubled by this problem, which is aggravated by the all-or-nothing character of the indemnity doctrine. Cf. *Hurdich*, supra, where there was occasion to use the tort concept of contribution rather than the contract notion of indemnity. 503 F.2d at 403. As early as *McLaughlin*, supra, we expressed our misgivings about the "apparently irrational result" in these cases, but concluded that the roots of the difficulty lay in decisions of the Supreme Court,[6] and that for this reason "inferior federal courts will do better to abstain from further adventures

5 Brief of Defendant and Third-Party Plaintiff-Appellee, at 13.

6 Responsibility for longshoremen's injuries has been differently allocated at different times, with each successive solution causing new problems. For the history of the judicial and legislative attempts to deal with the problem, see Stover, Longshoreman-Shipowner-Stevedore: The Circle of Liability, 61 Mich. L. Rev. 539 (1963). See also *Fairmont Shipping Corp.* v. *Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir.), cert. denied, 44 U.S.L.W. 3203 (U.S. Oct. 6, 1975).

in this wonderland and leave doctrinal development to the Supreme Court" and to Congress. 408 F.2d at 1338.

Congress has responded to the need. In 1972, it substantially revised the allocation of liability for accidents of this sort. 33 U.S.C. § 905(b).[7] The new statutory scheme deals with these problems in a comprehensive way that would be impossible for a court. Since future cases will be governed by the statute, the reexamination of the settled law of this circuit which the Stevedore invites us to make would have only the most limited practical effect. Under these circumstances, we decline to depart from the precedents which Judge Neaher correctly found controlling.

The judgment of the district court is affirmed.

7 33 U.S.C. § 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Opinion of Judge Neaher Reported at 387 F. Supp. 754

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 C 409

JOSEPH RODRIGUEZ,

Plaintiff,

—against—

OLAF PEDERSEN'S REDERI A/S,

Defendant and
Third Party Plaintiff,

—against—

AMERICAN STEVEDORES, INC. and
A. M. KRISTOPHER CO., INC.,

Third Party Defendants.

APPEARANCES:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
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By W. P. KAIN, JR. and THOMAS F. MOLANPHY, ESQS.

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third-Party Defendant
By JOSEPH ARTHUR COHEN, ESQ.

NEAHER, *District Judge.*

This action was originally instituted by a longshoreman (Rodriguez) to recover damages from defendant shipowner

(Pedersen) for injuries he sustained while aboard the latter's ship. Pedersen, in turn, impleaded Rodriguez's employer, American Stevedores, Inc. (American) seeking indemnification for the monetary damages Pedersen was required to pay to Rodriguez. The case is now before the court solely on the indemnity claim; but in order to better understand the questions presented, the prior proceedings and present posture of the case will be briefly stated.

After a trial in 1971 before the late Judge Rosling of this court, the jury returned a verdict in favor of Rodriguez against Pedersen in the amount of $35,000. In answer to special interrogatories, the jury found the ship unseaworthy and the shipowner negligent but also found Rodriguez contributorily negligent and reduced his damages from $80,000 to the amount announced. Upon subsequent submission of Pedersen's claim for indemnity, the jury returned a separate verdict in favor of American, denying Pedersen a recovery over. Pedersen then moved for judgment *n.o.v.* or a new trial on the indemnity claim. Judge Rosling granted Pedersen the new trial.[1]

Pedersen has now moved for summary judgment on its indemnity claim, asserting that there are no new facts to be adduced at a new trial and that on the facts as brought out on the first trial, it is entitled to judgment as a matter of law. American opposes Pedersen's motion and has cross-moved under Rule 60(b), F.R.Civ.P., to act aside the order granting Pedersen a new trial and for reinstatement of the jury verdict denying indemnity. In so moving, American also acknowledges "that no purpose would be served by a new trial other than to have the record of the first

[1] Judgment was entered for plaintiff on the jury verdict and was not appealed. Judge Rosling died before a new trial could be commenced and the case was subsequently reassigned to the writer.

trial read to a different jury." [2] In short, both sides agree that all relevant facts are before the court.[3]

Before turning to the facts, the somewhat unusual posture of the case requires threshold consideration of the propriety of entertaining a motion for summary judgment at this juncture. The indemnity claim clearly remains as a completely separate action, having been "severed and deferred for later jury trial" by Judge Rosling.[4] Although such a trial was had, no judgment has ever been entered determining the action. The jury's verdict denying indem-

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[2] Affidavit in Support of Third Party Defendant's Motion, dated February 6, 1974, at 2.

[3] In its statement pursuant to General Rule 9(g) of this court, Pedersen stipulated that:

> "4. From the testimony and jury findings at the first trial, defendant and third party plaintiff stipulates, for the purposes of this motion, that it negligently created an unseaworthy condition which was a proximate cause of plaintiff's accident in that: The vessel's Chief Officer directed the foreman of ship cleaners employed by third party defendant . . . to cover the No. 2 hatch on the weather deck and not replace such covers in the lower decks of that hatch as had been removed during the course of cleaning operations; that such action left the No. 2 in total darkness and that the doors of the No. 4 'tween deck, which gave plaintiff initial access back to the No. 2 hatch, were not locked, were ajar, and there were no signs warning persons, such as plaintiff, that the conditions described above, existed."

American does not dispute any of the foregoing facts or claim there are any additional facts. All that American says in its Rule 9(g) statement is that:

> "Our position is that both the Shipowner and the Stevedore are bound by the jury determinations of Shipowner's negligence and plaintiff's contributory negligence, and that those findings evidence the existence of a factual issue on indemnity precluding conduct." Affidavit of Joseph Arthur Cohen, Esq.

[4] See Decision and Order ("Decision") filed September 28, 1971, at 2.

nity was set aside and a new trial ordered with a strong suggestion that the existing evidence was insufficient to support such a verdict.[5] The parties say that additional evidence does not exist. A judgment deciding the case one way or the other would seem to be in order.

American, in opposing the use of summary judgment procedure, suggests that the court merely "recall the order granting a new trial" and direct entry of judgment on the vacated jury verdict in its favor.[6] It contends that Judge Rosling having denied Pedersen's motion for judgment notwithstanding the verdict, the latter's declared intention not to offer additional proof is a waiver of its right to a new trial. Consequently, American argues, it should be relieved of the new trial order under Rule 60(b), the jury verdict in its favor should be reinstated, and judgment should be entered accordingly.[7]

Aside from the technical difficulties American's Rule 60(b) contentions present,[8] the court sees only two routes to an appealable judgment on the indemnity claim: (1) resubmission of the same evidence to a new jury, which neither party desires and which seems to make no sense here, or (2) re-examination by the court of the facts not in dispute, whether established by jury verdict or otherwise, to determine if judgment on the merits can be rendered as a matter of law. Pedersen's motion for summary

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[5] Decision at 4-5.

[6] Affidavit in Support of Third Party Defendant's Motion, dated February 6, 1974, at 3.

[7] Brief in Support of Third Party Defendant's Motion under Rule 60 at 2.

[8] Defendant and Third Party Plaintiff's Memorandum of Law, etc. at 3-4.

judgment urges route (2) and impresses the court as the better course.

Although a judge should not ordinarily disturb previous rulings of another judge in the same case, "the law of the case" rule is not so inflexible as to permit of no exception. Certainly it should not prevent the discharge of a judge's obligation to present an appellate court with the judgment he believes ought to be rendered in the case. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131 (2 Cir.), *appeal dism.* 352 U.S. 883 (1956), cited by Pedersen, supports such a view. See also *Petition of Kinsman Transit Company*, 368 F.2d 821 (2 Cir. 1968), fn. 9 at p. 825; *Ross Products, Inc.* v. *New York Merchandise Co.*, 242 F. Supp. 878 (S.D.N.Y. 1965); *Kaminsky* v. *Abrams*, 281 F. Supp. 501 (S.D.N.Y. 1968); *Rogers* v. *Valiente*, 426 F.2d 1361 (2 Cir. 1970), fn. 2 at p. 1363.

Finding no sound reason for holding that the prior rulings herein bar reconsideration of the merits of Pedersen's claim, we now examine what the parties agree are the facts which gave rise to that claim.

On July 3, 1967, Rodriguez and other members of his gang were discharging cargo from Pedersen's M/V "Sunny Prince." The gang was working on the upper 'tween deck level of hatch #2, when Rodriguez was summoned from that hatch at about 11:00 a.m. and directed to hatch #4 to do some unloading. When Rodriguez left hatch #2 he left his gloves and hook there, anticipating that he would return to work in that hatch. Shortly after arriving at hatch #4, he realized he would not be returning to hatch #2, and after having his lunch, he requested permission from his superior to go back to hatch #2 to retrieve his gloves and hook.

Meanwhile, unknown to Rodriguez, ship's cleaners in the employ of A. M. Kristopher Co., Inc., had gone into hatch

#2 to clean out the debris remaining after the completion of the unloading. In order to do so it was necessary for them to remove the covers from the upper 'tween deck. After they had completed the task, they asked the ship's chief officer whether they should replace the covers and were told by him not to do so. He also instructed them to close the main deck hatch opening. This, of course, left the #2 upper 'tween deck level in total darkness with a previously covered floor aperture now open.

As Rodriguez proceeded from hatch #4 to hatch #2, he walked through a door which had been left ajar and which gave access to a passageway connecting the two hatches at the 'tween deck level. Concededly there were no signs giving notice of the changed conditions in hatch #2. As it was dark in the passageway, Rodriguez used a small "penlight" for illumination. After arriving in the #2 hatch 'tween deck area, he tripped over the hatch coaming and fell through the uncovered opening into the lower hold, thereby sustaining his injuries.

Until Congress, in 1972, revised the statutory provision relating to actions of this nature,[9] the law in this circuit was well established that a finding of contributory negli-

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[9] 33 U.S.C. §905(a) and (b) now provide in pertinent part:

"(a) The liability of an employer prescribed in section 904 of this title shall be exclusive . . . .

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . ."

The instant action involves injuries sustained prior to the effective date of the statutory provision and is thus not governed thereby. See *Julian* v. *Mitsui O.S.K. Lines Ltd.*, 479 F.2d 433, 434 (5 Cir. 1973).

gence on the part of a plaintiff longshoreman caused his employer, the stevedore company, to be held liable per se to indemnify the defendant shipowner, *Hartnett* v. *Reiss Steamship Company,* 421 F.2d 1011, 1018 (2 Cir.), *cert. denied,* 400 U.S. 852 (1970); *McLaughlin* v. *Trellebarge Arcfartyge A/B,* 408 F.2d 1334, 1336 (2 Cir.), *cert. denied,*[10] 395 U.S. 946, 89 S.Ct. 2020, 23 L.Ed. 2d 464 (1969); *Mortensen* v. *A/S Glittre,* 348 F.2d 383 (2 Cir. 1965),[11] absent a finding that the shipowner prevented the stevedore company from fulfilling its warranty of workmanlike performance, *Weyerhaeuser S.S. Company* v. *Nacirema Operating Company, Inc.,* 355 U.S. 563, 567 (1958).

Here, it is undisputed that upon the liability trial, the jury found plaintiff's contributory negligence to be in excess of 55%. Without more, Pedersen would be entitled to a judgment over against American. A jury on the same evidence, however, denied the shipowner indemnity when that issue was presented to it.

Endeavoring to resurrect that verdict, American strenuously argues that "the jury determinations of shipowner's negligence and [Rodriguez's] contributory negligence . . . evidence the existence of a factual issue on indemnity precluding conduct," n. 4 *supra.*

While it is true that "the issue of whether the shipowner has precluded itself is an issue of fact," *Hurdich* v. *Eastmount Shipping Corp.,* 503 F.2d 397, at 401, n.3 (2 Cir. 1974) this is not to be taken as barring judicial evaluation of the sufficiency of the evidence relied on to support

[10] *Sub nom. Golten Marine Company* v. *Trelleborgs Angfartygs.*

[11] The theory behind this vicarious imposition of liability is that the employer warrants "to furnish employees who . . . will not negligently expose themselves to injury." *McLaughlin, supra,* 402 F.2d at 1337.

a finding that the shipowner should be denied indemnity. Indeed, it seems manifest that Judge Rosling set the jury's verdict aside and ordered a new trial because he viewed the existing evidence as insufficient to warrant such a denial.[12] In effect, the stevedore—not the shipowner—was given a second opportunity to develop facts to support its contention that indemnity should be denied.

On this motion the parties are in agreement that there is no additional evidence. The court must, therefore, decide whether on the essentially conceded facts a jury could reasonably infer that Pedersen's part in Rodriguez's accident constituted "conduct on its part sufficient to preclude recovery" of indemnity from American. *Weyerhaeuser, supra,* 355 U.S. at 567.

Exactly what constitutes conduct sufficient to preclude recovery was not explained in *Weyerhaeuser.* Cases in this circuit, while not striving for a precise definition, have established a meaningful parameter. Thus, in *Albanese* v. *N.V. Nederl. Amerik Steamr. Manta,* 346 F.2d 481, 484 (2 Cir.), *rev'd on other grounds,* 382 U.S. 283 (1965), the Court of Appeals stated:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough . . . ."

The above-quoted language was later approved in *Mortensen* v. *A/S Glittre, supra,* in which a jury found for Mortansen, a painter, against the shipowner but re-

[12] Decision at 4-5.

duced its verdict by approximately one-third because of Mortensen's contributory negligence. The trial court then directed a verdict on an indemnity claim in favor of the shipowner against Mortensen's employer, a ship-painting contractor, on the theory that the jury's finding of contributory negligence mandated a finding as a matter of law that the employer had breached its warranty of workmanlike performance.

On appeal, the employer argued that the question of whether the shipowner's conduct was a bar to recovery should have been left to the jury. The Court of Appeals rejected the contention in language apposite here:

> "It is well established that the mere creation of the unsafe condition is insufficient to preclude recovery over when the contractor's own negligence has brought the unseaworthiness of the vessel into play. *E.g., Crumady* v. *J. H. Fisser,* 358 U.S. 423, 79 S. Ct. 445, 3 L.E.2d 413 (1959).
>
> "Despite every opportunity to do so during the course of the trial, no effort was made to show and no claim was made that Glittre's conduct consisted of anything more than the creation of the hazard which underlay the unseaworthiness claim, let alone that it amount to 'active hindrance' of the contractor in the performance of its contractual duties, which as we stated in Albanese, supra, . . . is required to defeat the indemnification action." 348 F.2d at 385.

Requiring an active hinderance by the shipowner of the stevedore's performance is, manifestly, an appropriate standard in view of the fact that the stevedore's warranty is founded in contract, and not tort, law. *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.,*

376 U.S. 315 (1964). We are thus concerned not with weighing relative degrees of fault but with ascertaining causation in fact, *i.e.,* whether the shipowner's conduct, as imputed from its employees, actually interfered with the proper performance of the stevedore's job.

In deciding this question of causation, the trier of the facts is charged by the Court in *Italia, supra,* to place liability "upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury" (376 U.S. at 324). See *Hurdich* v. *Eastmount Shipping Corp., supra,* Slip Op. at 5416.

Here, a finding of fault on Pedersen's part must necessarily center around the creation by the ship's own officer of a potentially hazardous condition in hatch #2. This trap for the unwary is reminiscent of the oil "slick" in *Mortensen, supra.* In *Mortensen* it was the careless failure of the plaintiff workman to obey a direction to clean up any "slick" observed which brought about the chain of events resulting in the accident. Here, too, it was Rodriguez's own careless action in walking into the darkened hatch which brought about his injuries.

In this case there is a total absence of evidence warranting an inference that the creation of the hazard constituted interference by the shipowner with the stevedore's fulfillment of his warranty of workmanlike performance. Rodriguez did not enter hatch #2 in order to perform any assigned task. Pedersen had no reason to expect longshoremen to be in that hold, since the stevedores' work there had been completed. And if the *Italia* test is to be applied, Rodriguez and his gang boss were best situated to avoid the danger by inspection of the area with an adequate light.

In *Bertino* v. *Polish Ocean Line,* 402 F.2d 963, 866 (2 Cir. 1968), the court noted:

Opinion of Judge Neaher Reported at 387 F. Supp. 754

> "Even if the danger was created by the shipowner, indemnity over is permitted if the condition was obvious and the stevedore continued to work on did not correct it."

That language is also apposite here. Even though the darkened conditions in hatch #2 was created by Pedersen, it presented an obviously dangerous situation to Rodriguez, calling for the exercise of caution and the use of an adequate light. He nevertheless entered the hatch aided only by a "penlight." Rodriguez's own careless action having brought the danger into play, the shipowner may not be denied indemnity for having created the danger. See *United States Lines, Inc.* v. *Jarka Corp.*, 444 F.2d 26 (4 Cir. 1971); *K&H Ship Service Co.* v. *Weyerhaeuser Line*, 382 F.2d 711 (9 Cir. 1967).

Evaluating the facts of this case against the standards of causation established by *Hartnett-McLaughlin- Mortensen, supra,* it seems clear that the concurrent fault of Pedersen cannot be said to have prevented or handicapped the stevedore in his ability to do a workmanlike job, and that no jury verdict denying indemnity to the shipowner would be legally sustainable.

Pedersen's motion for summary judgment is accordingly granted, the form of judgment to be settled by the parties on notice.

So ordered.

/s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, N.Y.
December 27, 1974

Judgment of District Court

UNITED STATES DISTRICT COURT

Eastern District of New York

Joseph Rodriguez,

Plaintiff,

—against—

Olaf Pedersen's Rederi A/S,

Defendant and Third Party Plaintiff,

—against—

American Stevedores, Inc. and A.M. Kristopher Co., Inc.,

Third Party Defendants.

Defendant and third party plaintiff, above named, by its attorneys, Haight, Gardner, Poor & Havens, having moved this Court by Notice of Motion dated November 27, 1973, for an order pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for summary judgment on defendant and third party plaintiff's claim for indemnity against third party defendant, American Stevedores, Inc., and the Court having read the affidavit of William P. Kain, Jr., Esq., sworn to the 27th day of November, 1973 in support thereof and the affidavit of Joseph Arthur Cohen, Esq., sworn to the 6th day of February, 1974 in opposition thereto and third party defendant, American Stevedores, Inc., by its attorneys, Alexander, Ash, Schwartz & Cohen, having moved this Court for

an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure re-instating the jury verdict of March 1, 1971 in favor of American Stevedores, Inc. on the indemnity claim of defendant and third party plaintiff and the Court having read the affidavit of Joseph Arthur Cohen, Esq., sworn to the 6th day of February, 1974 in support thereof and the Court having further heard oral argument of counsel in support of and in opposition to both said motions and due deliberation having been had thereon as well as on the authorities submitted by the parties in their various memoranda of law, and the Court, in its opinion dated December 27, 1974, having determined that the motion of defendant and third party plaintiff should be granted and that the motion of third party defendant should be denied,

Now, on motion of Haight, Gardner, Poor & Havens, attorneys for defendant and third party plaintiff it is,

ORDERED, ADJUDGED AND DECREED that

(1) Defendant and third party plaintiff's motion for summary judgment against third party defendant, American Stevedores, Inc., be and the same is hereby granted;

(2) Defendant and third party plaintiff have judgment against third party defendant, American Stevedores, Inc., in the amount of $37,094.60, the full amount of plaintiff's recovery including interest and costs as taxed, plus interest at 6% per annum from January 27, 1972, the date said judgment was satisfied, and, in addition thereto, reasonable counsel fees, costs and disbursements incurred in the defense of plaintiff's claim:

(3) The respective amounts of recoverable counsel fees and disbursements may be added to the foot hereof in sums to be agreed upon or, failing such agreement, in such sums as may be fixed by the Court;

(4) That the motion of third party defendant, American Stevedores, Inc., be and the same is hereby denied.

Dated: Brooklyn, New York
February 3, 1975

/s/ EDWARD R. NEAHER
U.S.D.J.

Opinion of Judge Rosling

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

JOSEPH RODRIGUEZ,

Plaintiff,

—against—

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

—against—

AMERICAN STEVEDORES, INC. and
A. M. KRISTOPHER COMPANY, INC.,

Third Party Defendants.

Appearances:

DICOSTANZO, KLONSKY & CUTRONA, ESQS.
Attorneys for Plaintiff

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant and
Third Party Plaintiff
William P. Kain, Jr., Esq.
Of Counsel

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third Party Defendant
Joseph Cohen, Esq.
Of Counsel

Decision and Order

Opinion of Judge Rosling

ROSLING, *J.*

On February 26, 1971, the jury rendered a verdict in favor of the plaintiff, Joseph Rodriguez, against Olaf Pedersen Rederi, the defendant shipowner, in the sum of $35,000. In addition to rendering such general verdict it answered written interrogatories submitted to it by the court pursuant to Fed. R. Civ. P. 49(b) in which it found the longshoreman plaintiff contributorily negligent and reported that it had by reason of such contributory negligence reduced the award of damages plaintiff had sustained to the sum announced as its verdict. On March 1st the court submitted to the same jury which had been held over to hear the third party claim by the shipowner against the American Stevedores, Inc., third party defendant,[1] for indemnity, a further interrogatory asking the jury to report the amount of damages they had found before reduction for contributory negligence. The jury answered that the unreduced damages totalled $80,000.

The court thereupon severed and deferred for later jury trial so much of the shipowner's claim-over as sought indemnification for counsel fees and disbursements for defending the primary suit and proceeding to try the issue of the shipowner's claim to indemnification as to the longshoreman's recovery of damages for his injuries. Such issue was submitted to the jury without the introduction of further evidence by either party. Before the submission both these parties moved for directed verdicts which the court denied.

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[1] The crossclaim of the stevedore against the third party co-defendant A. M. Kristopher Co., Inc., and the counter cross-complaint by the latter against the stevedore were discontinued in the course of the trial.

The shipowner now moves under Fed. R. Civ. P. 50 for the following relief:

(1) To renew its motion for a directed verdict on the indemnity claim; and

(2) Judgment, notwithstanding the verdict; or

(3) A new trial of the issues raised by the indemnity claim.

The jury by its finding of substantial contributory negligence on the part of the primary plaintiff imposes a vicarious equal fault on the stevedore employer and forecloses escape from the shipowner's claim that the stevedore's performance was not of the requisite workmanlike quality. Only by a showing that the shipowner by its own affirmative act had thwarted such performance can the stevedore be absolved of liability.[2] The jury by its finding of contributory negligence compels the conclusion that it must have determined that Rodriguez's entry into the dark interior passageway with his inadequate flashlight and his proceeding from the exit door of hatch #4 to the uncovered

[2] Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U.S. 563, 567, 78 S. Ct. 438, 441 (1958); Hartnett v. Reiss Steamship Co., 421 F.2d 1011 (2d Cir. 1970), cert. denied, 400 U.S. 849; McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334, 1336 (2d Cir. 1969), cert. denied, 395 U.S. 946 (1969); Albanese v. N. V. Nederl. Amerik Stoomv. Maats, 392 F.2d 763 (2d Cir. 1968), rev. on other grounds, 393 U.S. 72 (1968); Mortensen v. A/S Glittre, 348 F.2d 383 (2d Cir. 1965); Nicroli v. Den Norske Afrika-Og Australielinie, 332 F.2d 651, 655 (2d Cir. 1964); Misurella v. Isthmian Lines, Inc., 328 F.2d 40 (2d Cir. 1964); Shenker v. United States, 322 F.2d 622 (2d Cir. 1963); Damanti v. A/S Inger, et al., 314 F.2d 395, 399 (2d Cir. 1963); Drago v. A/S Inger, 305 F.2d 139 (2d Cir. 1962); H. & H. Ship Service Co. v. Weyerhaeuser, 382 F.2d 711 (9th Cir. 1967); Calmar Steamship Corp. v. Nacirema Operating Co., 266 F.2d 79, 81 (4th Cir. 1959).

'tween deck of hatch #2 where he fell constituted such contributory negligence.

Whether the shipowner's negligence and the unseaworthiness of the ship lay in the failure of the ship to post an appropriate warning on the exit door of hatch #4 or its failure to provide lighting in the passageway to hatch #2 or, finally, in failing to keep the 'tween deck of hatch #2 covered even though the longshoremen's unloading of hatch #2 had been completed some hours before the accident is unclear. The critical point, however, with respect to which the ship might be held by its action or inaction to have thwarted workmanlike performance by the shipowner, is the unbarred 'tween deck exit door of hatch #4, for once beyond this door the longshoreman's contributory negligence came into play as he aproached the uncovered hatch in which he was hurt.

Whether the door should have been barred by the shipowner or stevedore against its use in the fashion described and whether, in any event, a warning notice should have been posted or an oral notice given to the longshoremen of the dangers involved in their wandering off into holds other than the one in which they were working is not the decisive question upon which liability will turn. The stevedore for its part had a later opportunity than the ship to bar the door or to give the warning or to do both. Was it sufficiently on notice of the condition so that its failure to act constituted an unworkmanlike performance of its contractual obligation?

The question is a close one and should be presented to a jury in the form of an interrogatory calling for a written answer. Counsel should perhaps provide the jury with factual enlightenment by evidence of the physical situation with focus directed to the door.

Opinion of Judge Rosling

Motions for a directed verdit and for judgment notwithstanding the jury verdict are denied. Motion for a new trial on the issues raised by the indemnity claim is granted.[3] Case is set down for assignment for trial and fixation of a trial date on October 8, 1971, at 2:15 P.M.

The foregoing decision constitutes the findings of fact, conclusions of law and order of the court.

GEORGE ROSLING
U. S. D. J.

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[3] The issues of counsel fee to be awarded to the shipowner and disbursements to be reimbursed were deferred by the court for later trial by a second jury. In view of the long delay which has already supervened since the trial of the claim-over for indemnification and the necessity for the retrial of that issue, the court recalls its earlier direction for deferral and now directs that the entire claim-over be tried or retried in a single jury trial to be held on a date fixed in the order to be entered hereon.

Supreme Court, U. S.
FILED
APR 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1249

AMERICAN STEVEDORES, INC.,

Petitioner,

—against—

OLAF PEDERSEN'S REDERI A/S,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

WILLIAM P. KAIN, JR. and
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LEX PRINTING CO., INC., 451 GREENWICH ST., N.Y. 10013—966-4300

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

AMERICAN STEVEDORES, INC.,

Petitioner,

—against—

OLAF PEDERSEN'S REDERI A/S,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

This case began as an action by one Joseph Rodriguez to recover damages for personal injuries which he sustained on July 3, 1967, while working as a longshoreman in the employ of American Stevedores, Inc. aboard the m/s Sunny Prince, a cargo vessel owned by Olaf Pedersen's Rederi A/S. American Stevedores, Inc., the petitioner herein, was one of two parties impleaded into the suit as a third party defendant.

Following a trial on the merits, the jury returned a verdict in favor of plaintiff on the grounds of negligence and unseaworthiness. Because of a further finding that plaintiff had been contributorily negligent, the award of

$80,000 was reduced to $35,000. A further jury finding that the vessel owner was not entitled to indemnity against plaintiff's employer was subsequently set aside by the Trial Judge and a new trial ordered on that issue. The judgment in favor of Rodriguez was satisfied by respondent and he has not since been involved.

After reassignment of the case to another District Judge and, prior to a second trial of the indemnity issue, the vessel owner moved for summary judgment against the stevedore. The motion was granted, *Rodriguez* v. *Olaf Pedersen's Rederi A/S,* 387 F. Supp. 754 (E.D.N.Y., 1974) and this decision was affirmed on appeal, —— F. 2d —— (2 Cir., 1975). Both opinions are included in petitioner's appendix. Respondent will not here belabor the facts of the case for, as noted by the Court of Appeals, ". . . [They] are set out in detail in Judge Neaher's thorough opinion, 387 F. Supp. 754 . . ."

Petitioner now seeks review of a number of issues, several of which are raised for the first time in this Court.

POINT I

The basic issue raised by the petition is one of limited application at present and, probably, will soon become moot.

Respondent submits that the basic issue here, discussed in Point II B of petitioner's brief, is whether the contributory negligence of an injured longshoreman, imputed to his employer on a shipowner's claim for indemnity, constitutes a breach of the employer's warranty of workmanlike performance as a matter of law. While the First, Second, Fourth and Ninth Circuits have answered in the

affirmative,* the Fifth Circuit has held that a finding of contributory negligence is but a factor to be considered in determining the employer's breach of warranty.**

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.,* this issue was one of continuing vitality, for in virtually all longshoreman personal injury cases the employer was inevitably impleaded under the doctrine of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956). However, as recently pointed out by this Court in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 417 U.S. 106 (1974) at p. 113, fn. 6, the intent and effect of the 1972 Amendments are to overrule the *Ryan* doctrine in all cases arising after their effective date.

In cases decided before the 1972 Amendments were enacted, attempts were made to interest this Court in the present issue but to no avail, *Hartnett* v. *Reiss S.S. Co.,* 421 F. 2d 1011 (2 Cir., 1970) cert. denied, *sub. nom., Grain Handling Co.* v. *Hartnett,* 400 U.S. 852 (1970); *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir., 1969) cert. denied, *sub. nom., Golten Marine Co.* v. *Trelleborgs Angfartygs A/B,* 395 U.S. 946 (1969). It came with

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* See, *Martinez* v. *Compagnie Generale Transatlantique,* 517 F. 2d 371 (1 Cir., 1975), cert. denied —— U.S. ——, 46 L.Ed.2d 636 (1976); *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir., 1969) cert. denied, 395 U.S. 946; *United States Lines, Inc.* v. *Jarka Corp. of Baltimore,* 444 F. 2d 26 (4 Cir., 1971); *Chinese Maritime Trust, Ltd.* v. *Carolina Shipping Co.,* 456 F. 2d 192 (4 Cir., 1972) and *Arista Cia. de Vapores S.A.* v. *Howard Terminal,* 372 F. 2d 152 (9 Cir., 1967).

** *Julian* v. *Mitsui O.S.K. Lines, Ltd.* 479 F. 2d 432 (5 Cir., 1973), cert. denied 414 U.S. 1093 (1973).

While it has been suggested that the Third Circuit, too, follows the factor approach, *Shaw* v. *Lauritzen,* 428 F. 2d 251 (3 Cir., 1970), a reading of that opinion shows that the court was not dealing with a specific finding of contributory negligence.

little surprise, then, that in cases decided after the enactment of the 1972 Amendments but arising prior to their effective date, petitions to review the issue met a similar fate, *Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 479 F. 2d 432 (5 Cir. 1973) cert. denied, *sub nom., Mitsui O.S.K. Lines, Ltd.* v. *Strachan Shipping Co.*, 414 U.S. 1093 (1973); *Santiago Martinez* v. *Compagnie Generale Transatlantique*, 517 F. 2d 371 (1 Cir., 1975) cert. denied, —— U.S. ——, 46 L.Ed. 2d 636 (1976).

The reluctance to disturb established principles in their twilight was recognized by the Court of Appeals in the instant case. As Judge Feinberg stated in the concluding paragraph of the Court's opinion:

> "Since future cases will be governed by the statute, the reexamination of the settled law of this Circuit which the Stevedore invites us to make would have only the most limited practical effect."

Respondent submits that, the opinion below expressing the better view of the issue, as discussed in Point II, *infra*, there is even less reason for review by the Court at this time.

POINT II

Petitioner owed to respondent a warranty of workmanlike performance under the facts of this case and the contributory negligence of the former's employee constituted a breach of that warranty as a matter of law.

It should be noted at the outset that in neither of the courts below did petitioner seriously contend that it owed no warranty of workmanlike performance to respondent under the facts of this case and, accordingly, no such issue

is discussed in either opinion. Respondent respectfully submits that petitioner should not now be heard to raise such an issue* for the first time in this Court, *Ellis* v. *Dixon*, 349 U.S. 458 (1955); *Lawn* v. *U.S.*, 355 U.S. 339, 362 (footnote); *California* v. *Taylor*, 353 U.S. 553, 557 (footnote); *United States* v. *Howard*, 352 U.S. 212, 217; *Weade* v. *Dichmann Co.*, 337 U.S. 801, 808.

(a) The Stevedores Warranty Exists Regardless of Shipowners Fault

Quite apart from the untimeliness of petitioner's contention, however, is its lack of merit. To contend that a stevedore's warranty of workmanlike performance is "judicially invoked" only in favor of a shipowner held liable for unseaworthiness and which is, otherwise, without fault, totally ignores a fundamental precept of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) where this Court held at p. 134:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

So. too, in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563 (1958), the Court noted at p. 569:

> ". . . In the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., supra (350 U.S. at 132, 133)."

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* Point II A. of petitioner's brief.

Finally, respondent would point to what petitioner at p. 18 of its brief, calls a well-reasoned decision in *DeGioia* v. *United States Lines Company,* 304 F. 2d 421 (2 Cir., 1962) where Judge Clark stated at p. 424:

> "Whether a hazard is created by the negligence of the shipowner or otherwise, the stevedoring firm is liable for indemnity if a workmanlike performance would have eliminated the risk of injury."

(b) Employee's Contributory Negligence—Breach of the Employer's Warranty of Workmanlike Performance as a Matter of Law

Petitioner concedes that the First, Second, Fourth and Ninth Circuits are in complete agreement that a longshoreman's contributory negligence, which is imputed to his employer on the issue of indemnity, constitutes a breach of the employer's warranty as a matter of law. In urging that this Court now adopt the Fifth Circuit "factor" approach of *Julian* v. *Mitsui O.S.K. Lines, Ltd.,* 479 F. 2d 432 (5 Cir., 1973), cert. denied, 414 U.S. 1093 (1973), petitioner disregards the well-reasoned dissent which would have followed the *per se* rule as well as the expressed reluctance of the majority to re-study the issue in view of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Again, in citing *Anzalone* v. *Moore-McCormack Line, Inc.,* 36 N.Y. 2d 684 (1975) affirming, without opinion, the Appellate Division's adoption, by a divided court, of the "factor" test, 43 A.D. 2d 818, petitioner overlooks this Court's admonition that state courts follow the decisions of the federal courts when determining issues of maritime law, *Robins Dry Dock Co.* v. *Dahl,* 266 U.S. 449 (1925).

In support of the *per se* approach of the First, Second, Fourth and Ninth Circuits, respondent returns to *Mc-*

Laughlin v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir. 1969) cert. denied, 395 U.S. 946, wherein the choice was carefully considered by the Second Circuit at p. 1336:

> "The similarity in name between negligence and contributory negligence masks an essential difference in concept. Whereas negligence is a breach of a duty to others and gives rise to a right in the person injured, contributory negligence is simply a disability preventing a plaintiff from recovering. See Restatement of Torts 2nd. §463 (1965); 2 Harper & James, Torts § 22.10 (1956); Prosser, Torts § 64 (2d ed. 1964). A rule whereby the employee's disability automatically creates a right in the shipowner to be indemnified by the employer can thus be sound only if the employer is deemed to have undertaken not simply to use reasonable care to select, train and supervise employees so that they will protect themselves, but to furnish employees who in fact will not negligently expose themselves to injury. If the warranty were only of the more limited sort, the contributory negligence of an employee, although some evidence of breach, would not alone support a verdict in favor of the indemnitee, let alone the direction of one.
>
> "We think however that under Italia Societa per Azioni v. Oregon Stevedoring Co., 376 U.S. 315, 84 S.Ct. 748, 11 L. Ed. 2d 732 (1964), the W.W.P. is not so limited."

Petitioner's attempt to "create" an intra-circuit conflict within the Second Circuit is without substance. In citing *Nye* v. *A/S D/S Svendborg,* 501 F. 2d 376 (2 Cir., 1974), cert. denied, 420 U.S. 964 (1975), petitioner fails to acknowledge the statement of the Court of Appeals, 501 F. 2d at 380:

> "The principles set forth in cases dealing with a stevedore's implied warranty of workmanlike performance are not applicable in this case."

In the instant case, the Court of Appeals made the distinction quite clear (petitioner's appendix, p. 6a) as it had previously done in *King* v. *Deutsche Dampfs-Ges,* 523 F. 2d 1042 (2 Cir., 1975).

POINT III

This Court's decision in *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) does not require reconsideration of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

In Point III of its brief petitioner would have the Court adopt a theory of contribution between shipowner and stevedore in lieu of the full indemnity concept of *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation,* 350 U.S. 124 (1956)—another argument which was not raised in either court below. In so doing, petitioner relies on *United States* v. *Reliable Transfer Co., Inc.,* 421 U.S. 397 (1975) and *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke Inc.,* 417 U.S. 106 (1974). While both cases did adopt theories of liability according to proportionate fault, neither involved a situation where one of the parties sought to be charged was the employer of an injured plaintiff and therefore not liable for contribution, as was the case in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952). In fact, this very distinction was noted by the Court in *Cooper, supra,* when it stated, 417 U.S. 106 (1974) at 115:

> "In sum, our opinion in Atlantic was not intended to answer the question posed by the present case, as its failure to discuss Horton, Watz and Seaboard indicates. Rather, Atlantic proves only that our decision in Halcyon was, and still is, good law on its facts."

The *Atlantic* decision, referred to in the quote, is, of course, this Court's *per curiam* opinion in *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company,* 406 U.S. 340 (1972) which, in one brief paragraph, reaffirmed the vitality of *Halcyon.*

POINT IV

Petitioner was not denied a jury determination on the issue of conduct sufficient to preclude indemnity where the record discloses no evidence of such conduct.

On respondent's motion for summary judgment in the District Court, it was held that the contributory negligence of plaintiff, as previously found by the trial jury, was binding upon petitioner, his employer, and constituted a breach of its warranty of workmanlike performance as a matter of law. Petitioner then contended that, notwithstanding such breach, it was entitled to a jury trial on the issue of whether there was conduct on the part of respondent sufficient to preclude recovery in indemnity under *Weyerhaeuser S.S. Company* v. *Nacirema Operating Company, Inc.,* 355 U.S. 563 (1958). After noting that such issue was ordinarily a question of fact, Judge Neaher pointed out that:

> "On this motion the parties are in agreement that there is no additional evidence. The Court must, therefore, decide whether on the essentially conceded facts a jury could reasonably infer that Pedersen's part in Rodriguez' accident constituted 'conduct on its part sufficient to preclude recovery' of indemnity from American."

Under the essentially conceded facts, Judge Neaher concluded that respondent had negligently created a dangerous condition aboard the vessel but that this did not prevent or seriously handicap the stevedore in his ability to do a workmanlike job under *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats,* 346 F. 2d 481, 484 (2 Cir., 1965) reversed on other grounds, 382 U.S. 283 (1965) and that it was actually the contributory negligence of petitioner's employee (plaintiff) which brought about his own injuries.

In affirming, the Court of Appeals observed (Petitioner's Appendix p. 7a):

> "The shipowner's fault was the creation of a potentially hazardous condition by uncovering the hatch square on the 'tween deck in hatch #2 and blocking off the light coming from above. Nothing about this negligence on the shipowner's part prevented or hindered Rodriguez from rendering a workmanlike performance, that is, from using the safe route between hatches that was available, or at least securing adequate illumination before venturing down a dark corridor into a dark hatch."

Reported cases generally acknowledge that this Court has not indicated, specifically, what would constitute conduct sufficient to preclude recovery under *Weyerhaeuser, supra.* It fell, therefore, to the lower courts to formulate a test against which a shipowner's conduct could be judged. In *Albanese, supra,* the Second Circuit stated the test as follows, 346 F. 2d at 484:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job."

Despite petitioner's assertions to the contrary, the Second Circuit in the instant case held that the test today remains the same. Other Circuits, too, have followed the *Albanese* test, *Old Dominion Stevedoring Corp.* v. *Polskie Linie Oceaniczne,* 386 F. 2d 193 (4 Cir., 1967); *Tebbs* v. *Baker-Whiteley Towing Co.,* 407 F. 2d 1055 (4 Cir., 1969); *D/S Ove Skou* v. *Hebert,* 365 F. 2d 341 (5 Cir., 1966); *Victory Carriers, Inc.* v. *Stockton Stevedoring Co.,* 388 F. 2d 955 (9 Cir., 1968). The *Albanese* test having met with general acceptance, there would appear to be no reason to discuss the extensive quotation from *Badalamenti* v. *United States,* 160 F. 2d 422 (2 Cir., 1947) on pages 14-16 of petitioner's brief as that opinion, obviously, was written prior to the birth of the *Ryan* doctrine and was not concerned with the issues now before the Court.

Measured against the *Albanese* test, the conclusion is inescapable that respondent's negligence in no way effected Rodriguez' decision to proceed as he did and that his contributory negligence, as found by the trial jury, brought into play the unseaworthiness of the vessel within the meaning of *Crumady* v. *Joachim Hendrick Fisser,* 358 U.S. 423. With the parties in agreement that there was no further evidence to be adduced at a new trial, the cause was ready for summary disposition under Rule 56 of the Federal Rules of Civil Procedure in the District Court.

Petitioner's contention that it was denied trial by jury was, of course, considered by the Court of Appeals and rejected (petitioner's appendix p. 11a, fn. 4):

> "Our conclusion that the Shipowner's conduct did not preclude indemnity as a matter of law disposes of the Stevedore's contention that it was deprived of its right to have a jury determination of the issue. Although the Stevedore is correct that this is ordinarily

> an issue of fact, Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 567 (1958); Hurdich v. Eastmount Shipping Corp., 503 F. 2d 397, 401 n. 3 (2d Cir., 1974), the court of course remains free to direct a verdict where the evidence is insufficient to raise a jury question, and we have approved the trial judge's decision to do so in appropriate cases. See, e.g., Mortensen v. A/S Glittre, 348 F. 2d 383 (2d Cir., 1965)."

In like manner did the Court of Appeals dispose of an identical contention by the stevedore in *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir., 1969) at p. 1338:

> "We are reversing no jury determination here; the jury has found that McLaughlin acted unreasonably."

See also, *King* v. *Deutsche Dampfs-Ges,* 523 F. 2d 1042 (2 Cir., 1975) where the Court concluded its opinion, in a footnote, as follows:

> "We repeatedly have rejected appellants' further argument that the grant of judgment in favor of the shipowner on its indemnity claim against the employer of an injured plaintiff deprives the employer of its right to jury trial under the Seventh Amendment. See, e.g. *McLaughlin, supra,* 408 F. 2d at 1337-38; *Hartnett, supra,* 421 F. 2d at 1017-18. Liability is imposed as a matter of law on the employer of a contributorily negligent plaintiff once the jury has made its finding of contributory negligence. Since the dispositive issue is that of contributory negligence which is left to the jury, there is no usurpation of the jury's function."

The reference, on p. 10 of petitioner's brief to *International Terminal Operating Co., Inc.* v. *N.V. Nederl*

A. S. M., 393 U.S. 74 (1968) may be somewhat misleading as it is a second consideration by this Court of some of the issues raised in *Albanese, supra.* To clarify any such potential misunderstanding, respondent would point out that, in reversing on the first occasion, 382 U.S. 283, this Court left undisturbed the test against which "conduct sufficient to preclude recovery" was to be measured. When the case returned to this Court, 393 U.S. 74 (1968) the sole issue presented was whether the stevedore-petitioner had breached its warranty of workmanlike service as a matter of law. Unlike the present case, there was no jury finding of contributory negligence on the part of the stevedore's employee, and, accordingly, this Court held that the initial question of whether there had been a breach of the stevedore's warranty should have been left to the jury.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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